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No. 87-1651

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

COMMONWEALTH OF MASSACHUSETTS,
Petitioner,

v.

DOUGLAS L. OAKES,
Respondent.

On Writ of Certiorari to the Supreme Judicial Court of the Commonwealth of Massachusetts

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BRIEF FOR PETITIONER

JAMES M. SHANNON *
Attorney General
Commonwealth of Massachusetts

PHYLLIS N. SEGAL
A. JOHN PAPPALARDO
Deputy Attorneys General

MADELYN F. WESSEL
JUDY G. ZEPRUN
H. REED WITHERBY
Assistant Attorneys General
One Ashburton Place, Rm. 2001
Boston, Massachusetts 02108
Tel.: 617-727-2200

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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QUESTION PRESENTED

Whether the theoretical possibility that a criminal statute designed to prevent the sexual abuse and exploitation of children could be applied marginally to conduct protected by the First Amendment justifies invalidation of the entire statute on overbreadth grounds and reversal of respondent's conviction without deciding whether the respondent's actions were within the statute's substantial legitimate reach.

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Frisby v. Schultz, 56 U.S.L.W. 4785 (U.S. June 29, 1988)	28, 30
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Ginsburg v. New York, 390 U.S. 629 (1968)	16

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United States v. Dost, 636 F. Supp. 828 (S.D. Cal. 1986), *aff'd sub nom. United States v. Wiegand*, 812 F.2d 1239 (9th Cir. 1987)	32

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United States v. Smith, 795 F.2d 841 (9th Cir. 1986), *cert. denied*, 107 S. Ct. 1964 (1987)	17, 32
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Mass. Gen. Laws Ann. ch. 265, §§ 13B, 14, 22A, 23, 24B, 26A	25
Mass. Gen. Laws Ann. ch. 272, § 29A (West Supp. 1987)	*passim*
Mass. Gen. Laws Ann. ch. 272, § 29B (West Supp. 1987)	25
Mass Gen. Laws Ann. ch. 272, § 31 (West Supp. 1987)	3
Mass. Gen. Laws Ann. ch. 272, §§ 1, 4, 4B, 28, 33, 35A, 58	25, 26
Miscellaneous	
American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders III*, Revised Third Edition (1987)	23
A.W. Burgess, *Child Pornography And Sex Rings* (1984)	19, 24
Department of Social Services, MA, Report, Services to Sexually Abused Children And Their Families, Part II at 20 (1987)	27
Effect of Pornography on Women and Children, 1984: Hearings on S. Hrg. 98-1267 Before the Subcomm. on Juv. Justice, 98th Cong., 2d Sess. (1984)	24

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D. Finkelhor, *The Sexual Climate of Families*, University of New Hampshire (1983)	21
K. Lanning and A.W. Burgess, *Child Pornography and Sex Rings*, Fed. Bur. Inv. Law Enforcement Bull. (1984)	18, 23
K. Lanning, *Child Molestors: A Behavioral Analysis*, National Center for Missing and Exploited Children (1987)	19, 23
Note, *Protection of Children From Use in Pornography: Toward Constitutional and Enforceable Legislation*, 12 U. Mich. J. L. Ref. 295 (1979)	20
Monaghan, *Overbreadth*, 1981 S. Ct. Rev. 1	9
Potuto, *Stanley + Ferber=Constitutional Crime of At-Home Child Pornography Possession*, 76 Ky. L. J. 15 (1987)	19, 21
Sen. Comm. on Governmental Affairs, Perm. Sub. Comm. 99th Cong. 2d Sess., Rep. No. 99-537, Child Pornography and Pedophelia (1986)	24
Sutherland, Statutory Construction § 2.07 (4th ed. 1985)	30
L. Tribe, American Constitutional Law, § 12-31 (1988)	13
U.S. Dept. of Justice, Attorney General's Comm'n on Pornography, Final Report (1986)	18, 19, 20
U.S. Dept. of Justice, Office of Juv. Justice and Delinquency Prevention, Exec. Summ., Pro. No. 84-JN-AX-K007 (1987)	22, 23
Webster's New Collegiate Dictionary (1979)	23

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Supreme Judicial Court for the Commonwealth of Massachusetts is reported at 401 Mass. 602, 518 N.E.2d 836 (1988), and is reproduced in the Appendix A to the Petition for Writ of Certiorari. The opinion of the Superior Court Department of the Trial Court of Massachusetts is unpublished but is reproduced in the Supplemental Appendix to the Petition for Writ of Certiorari at 1.

JURISDICTION

The judgment of the Supreme Judicial Court for the Commonwealth of Massachusetts was entered on February 1, 1988. The petition for a writ of certiorari was filed on April 1, 1988. This Court granted the petition on May 23, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3) (1982).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment of the United States Constitution provides, in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press. . . .

The Fourteenth Amendment of the United States Constitution provides, in pertinent part:

> [N]or shall any state deprive any person of life, liberty, or property, without due process of law. . . .

The relevant sections of Chapter 272 of the General Laws of Massachusetts provide:

> Whoever with knowledge that a person is a child under eighteen years of age, or whoever while in possession of such facts that he should have reason to know that such person is a child under eighteen years of age, hires, coerces, solicits or entices, employs, procures, uses, causes, encourages, or knowingly permits such child to pose or be exhibited in a state of nudity or to participate or engage in any act that depicts, describes or represents sexual conduct for purposes of visual representation or reproduction in any book, magazine, pamphlet, motion picture film, photograph, or picture shall be punished by imprisonment in the state prison for a term of not less than ten nor more than twenty years, or by a fine of not less than ten thousand dollars nor more than fifty thousand dollars, or by both such fine and imprisonment.
>
> It shall be a defense in any prosecution pursuant to this section that such visual presentation or reproduction of any posture or exhibition of any posture or exhibition in a state of nudity was produced, processed, published, printed or manufactured for a bona fide scientific or medical purpose, or for an educational or cultural purpose for a bona fide school, museum or library.

Mass. Gen. Laws Ann. ch. 272, § 29A (West Supp. 1987).[1]

> As used in sections twenty-eight, twenty-eight C, twenty-eight D, twenty-eight E, twenty-nine, twenty-nine A, twenty-nine B, thirty and thirty D, the following words shall, unless the context requires otherwise, have the following meanings: . . .
>
> "Nudity", uncovered or less than opaquely covered post-pubertal human genitals, pubic areas, the post-pubertal human female breast below a point immediately above the top of the areola, or the covered male genitals in a discernibly turgid state. For purposes of this definition a female breast is considered uncovered if the nipple or the nipple or areola only are covered. In the case of pre-pubertal persons nudity shall mean uncovered or less than opaquely covered pre-pubertal human genitals or pubic area. . . .

Mass. Gen. Laws Ann. ch. 272, § 31 (West Supp. 1987).

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[1] Section 29A was amended by St. 1987, c.294, § 1 to include "any live performance," an amendment which does not apply to this case. *See also Commonwealth v. Oakes*, 401 Mass. 602, 603 n.1, 518 N.E.2d 836, 837 n.1 (1988).

STATEMENT OF THE CASE

A. Procedural History

On January 9, 1985, the respondent Douglas Oakes ("Oakes") was indicted by a Worcester County Grand Jury for "soliciting a child to pose for pornographic purposes" in violation of Mass Gen. Laws ch. 272, § 29A (West Supp. 1987) [hereinafter, "section 29A"], Joint Appendix 1, 3a-4a [hereinafter, "J.A. (page)"].

On March 21, 1985, Oakes moved to dismiss the indictment on the ground, *inter alia*, that the statute was invalid on First Amendment overbreadth grounds. J.A. 1a. On July 16, 1985, the Superior Court denied the motion to dismiss. J.A. 1a.

On October 10, 1985, after a short trial, a Superior Court jury found Oakes guilty. J.A. 1a. The Superior Court sentenced him to a ten-year term to be served at MCI-Concord. J.A. 1a.

On November 7, 1985, Oakes appealed. J.A. 1a. On February 1, 1988, the Supreme Judicial Court of Massachusetts reversed Oakes's conviction and struck down the statute, section 29A, as unconstitutional. J.A. 2a.

B. Facts at Trial

This case arises from Oakes's coercion of his stepdaughter, a fourteen-year-old girl,[2] to pose for photographs that depicted her bare-breasted and in positions that are sexually suggestive.

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[2] When the victim first posed for the photographs in September, 1983, she was fourteen. *See* Tr. 22-24; J.A. 18a-20a. The Massachusetts Supreme Judicial Court misstated her age as fifteen. *Oakes*, 401 Mass. at 604, 518 N.E.2d at 837. References to the trial transcript are denoted "Tr. (page)." To the extent a portion of the trial transcript is reproduced in the Joint Appendix, a parallel citation is indicated.

Beginning in September, 1983, the victim was a modeling student at La Femmina Modeling School. Tr. 23; J.A. 19a. Oakes, her stepfather, began to take hundreds or thousands of photographs of the victim. Tr. 24, 54; J.A. 2a, 5a. At first, Oakes took photographs of the victim in clothes but then he progressed to taking photographs of her in body suits, bathing suits, and outfits from Frederick's of Hollywood. Tr. 24, 65-68; J.A. 21a, 34a-35a. Ultimately, he manipulated her into posing for nude photographs. Tr. 24, 68; J.A. 21a. Oakes selected the poses. Tr. 26; J.A. 23a.

The photographs depict the victim posed on top of a bar in the basement of the house, wearing a red scarf around her neck and red and white striped bikini underpants. The photographs prominently feature her breasts. *See* Trial Exs. 1-10.[3] The nature of the photographs can be gleaned from Oakes's suggestion to his stepdaughter that he wanted to make her "big for Playboy." Tr. 28; J.A. 25a.

The photographs were taken in secret. Although the victim's mother knew that Oakes was photographing the victim in clothes, she did not know that he was also taking nude photographs. Tr. 37; J.A. 34a.[4]

Not surprisingly, these sexually suggestive and inappropriate photographs troubled and embarrassed the victim. She ripped them up and threw them away in the woods. Tr. 27; J.A. 24a.

The coercive nature of the relationship between Oakes and his stepdaughter[5] is demonstrated by what happened

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[3] The trial exhibits were transmitted as part of the record from the Superior Court Department of the Trial Court, Worcester County, MA, to the Clerk of the Supreme Court.

[4] The photographs were not only taken in secretive circumstances but also were kept hidden. They were hidden first in a locked safe (Tr. 45; J.A. 43a) and then in a false ceiling in the basement. Tr. 36; J.A. 34a.

[5] Children who are the subjects of photographs that depict them engaged in sexual activity or in a state of nudity commonly are

next: upon discovering that the photographs were missing, Oakes picked up the victim at her friend's house, and forced her to go into the woods to recover the photographs and then to lay them on the kitchen table to dry. Tr. 27; J.A. 24a.

At trial, Oakes denied taking the photographs. Tr. 57-61.

SUMMARY OF ARGUMENT

I

The First Amendment overbreadth doctrine is "strong medicine" to be used "only as a last resort." Invalidation of an otherwise valid criminal statute is not justified where the reviewing court has determined that a central core of regulable conduct is being addressed. To be unconstitutional, the statute's overbreadth must be substantial in comparison to its legitimate applications. In addition, as this Court has recently emphasized, the possibility that the statute may be applied to protected conduct must be more than conceivable, it must be real. Case-by-case adjudication is the appropriate cure where possible instances of invalid application are comparatively insignificant and merely theoretical. (Pages 9-13).

The court below erroneously asked only whether the challenged statute, which proscribes the sexual exploitation of children through their use in visual reproductions depicting them engaged in sexual activity or in a state of nudity, was susceptible to any troubling application—such as the depiction of a naked one-year-old in a wading pool. Once the court determined that such an application of the statute was conceivable, it

being exploited by the individual taking the photographs. *See infra* section II B. In the present case, Oakes was acquitted of four charges of rape of his stepdaughter. Comm. Brief, A.C. No. 86-147 at 2 n.2.

ceased all other consideration of the statute. The court's failure to consider whether the potential overbreadth is substantial or real constitutes a fundamental misapplication of federal overbreadth doctrine. (Pages 13-15).

II

The challenged statute, Mass. Gen. Laws ch. 272, § 29A ("section 29A"), defines a core of criminal conduct that the state may legitimately prohibit. The state has a compelling interest in preventing the sexual exploitation of children. In the area of child pornography, this Court has struck the balance of competing interests in favor of the compelling interest in protecting children. Far fewer First Amendment concerns are raised by laws like section 29A that regulate the production of child pornography, than by laws that regulate distribution. (Pages 15-17).

Section 29A is a child sexual exploitation statute punishing the enticement, solicitation, hiring and manipulation of children to pose nude or to engage in sexual activity for purposes of visual representation. The conduct proscribed is sexual exploitation, even if the product is not legally obscene. The child who has been manipulated or coerced into posing for nude photographs suffers harm no matter where the camera is aimed or what the lens frames. The child who has been forced to pose in a state of nudity has been conditioned to respond as a sexual object; may have been seduced; may have been physically molested; and may be harmed by the knowledge that the photographs exist. Finally, the photograph is an instrument of sexual exploitation as well as a record that sexual exploitation has occurred. (Pages 18-24).

Section 29A is part of an overall statutory scheme enacted to protect children from abuse. The text of the statute reflects the reality of child abuse: the conduct proscribed is exploitive conduct. Typically and historically, indictments under section 29A arise in conjunction with indictments for rape, indecent assault and battery

of a minor under fourteen, or both. There are no reported prosecutions for the type of benign parental photographs which common sense and the statute's plain meaning and context readily reveal to be beyond its intended reach. As such, both on its face and as a matter of practice, the scope of the statute's sweep in combatting the sexual exploitation of minors is plainly legitimate. (Pages 24-27).

III

The court below was overwhelmingly concerned with conceivable marginal applications of section 29A to prohibit benign parental pictures of young naked children or the use of child models to produce great works of art. This concern is unfounded. The purpose of the overbreadth doctrine—to avoid a chilling effect upon the exercise of First Amendment rights—is not served when the threat is neither real nor substantial. The goals, text, context, and enforcement history of section 29A make clear that the applications hypothesized by the court below are unrealistic and that prosecutors have had no difficulty in interpreting section 29A well within constitutional boundaries. In addition, the defense expressly provided in section 29A for bona fide works minimizes any risk that the statute will be unjustly applied. Further, appellate review would be available on a case-by-case basis if the statute were applied to arguably protected conduct. In sum, the threat to protected activity is neither real nor substantial and does not justify striking section 29A as invalid on its face. (Pages 27-31).

IV

Respondent Oakes's conduct in taking photographs of his fourteen-year-old stepdaughter with her breasts bare and prominently displayed was sexually exploitive and constitutionally proscribable. The photographs depict the victim wearing only a red scarf and striped bikini underpants. They do not depict the victim in the way a

child normally sits, reclines, or is positioned for a photograph. In some, she assumes a coy or sexually suggestive attitude. The photographs were produced in secret and were kept hidden. They caused the victim embarrassment, and when she threw them away, Oakes coerced her to retrieve them from the woods. Oakes did not testify to any benign or innocent explanation of his conduct, and the jury rejected any notion that the photographs had a bona fide purpose. The facts make clear that the statute, as applied to Oakes, is constitutional. (Pages 31-33).

ARGUMENT

I. THE COURT BELOW FAILED TO PROPERLY APPLY THE FIRST AMENDMENT OVERBREADTH DOCTRINE.

A. First Amendment Overbreadth Is A Drastic Remedy To Be Applied Only When Infringements On Protected Expression Are Substantial And Real.

The First Amendment overbreadth doctrine is an exception to the general rule that a person to whom a statute may be applied constitutionally may not challenge it on the grounds that it might conceivably be unconstitutionally applied to others in cases not before the court. *New York v. Ferber*, 458 U.S. 747, 767 (1982); *Broadrick v. Oklahoma*, 413 U.S. 601, 610 (1973); *see generally Gooding v. Wilson*, 405 U.S. 518 (1972); *Thornhill v. Alabama*, 310 U.S. 88 (1940).[6]

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[6] Beyond this "standing" component, the overbreadth doctrine also expresses a substantive constitutional standard for determining the validity of a statute affecting expression. *See* Monaghan, *Overbreadth*, 1981 S. Ct. Rev. 1, 3. This aspect of the overbreadth doctrine recognizes that even "under 'conventional' standing principles, a litigant has always had the right to be judged in accordance with a constitutionally valid rule of law." *Id.* at 3. In recent cases, this Court has described such a facial challenge as applying "to a statute that in *all* its applications directly restricts protected first amendment activity and does not employ means narrowly tailored to

Because the impact of the overbreadth doctrine can be devastating, leading, as in the present case, to total invalidation of a statutory scheme of profound importance to a state, this Court has made clear that this type of facial attack is "strong medicine" to be used "only as a last resort." *Broadrick*, 413 U.S. at 613. The narrow nature of the overbreadth doctrine was recently emphasized in *New York State Club Association v. City of New York*, 56 U.S.L.W. 4653, 4656 (U.S. June 29, 1988). *See infra* p. 12.

Particularly where conduct as well as speech is involved, this Court has made clear that the overbreadth of a statute must be substantial "*judged in relation to the statute's plainly legitimate sweep.*" *Ferber*, 458 U.S. at 770 (emphasis added) (quoting *Broadrick*). Facial invalidation is an inappropriate "cure" for potential marginal infringements of First Amendment rights, where " 'the remainder of the statute . . . covers a whole range of easily identifiable and constitutionally proscribable . . . conduct . . . .' " *Id.* at 770 n.25 (quoting from *CSC v. Letter Carriers*, 413 U.S 548, 580-81 (1973)); *compare Boos v. Barry*, 56 U.S.L.W. 4254, 4249 (U.S. March 22, 1988) (provision making it unlawful to congregate within 500 feet of embassy is not overbroad because it does not reach a substantial amount of constitutionally protected conduct, only conduct that threatens the peace and security of the embassy) *with Houston v. Hill*, 107 S. Ct. 2502, 2513 (1987) (enforceable portion of challenged statute has no "core of constitutionally

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serve a compelling governmental interest." *Secretary of State of Maryland v. J. H. Munson Co.*, 467 U.S. 947, 965-66 n.13 (1984) (emphasis added); *see New York State Club Association v. City of New York*, 56 U.S.L.W. 4653, 4657 (U.S. June 21, 1988); *City Council v. Taxpayers For Vincent*, 466 U.S. 789, 798 n.15 (1984). Overbreadth in this sense was neither claimed by respondent Oakes nor relied upon by the court below, and it obviously has no application to this case because the Massachusetts child sexual exploitation statute in issue here does not fit this description. *See infra* pp. 24-27.

unprotected expression") *and State of Maryland v. Munson*, 467 U.S. at 965-66 (no "core of easily identifiable and constitutionally proscribable conduct that the statute prohibits").

Where the challenged statute is aimed at criminal conduct, concern over its potential chilling effect diminishes even further. As this Court explained in *Broadrick*, the limited role of the overbreadth doctrine:

> attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from "pure speech" toward conduct and that conduct—even if expressive—falls within the scope of otherwise valid criminal laws that reflect legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct. Although such laws, if too broadly worded, may deter protected speech to some unknown extent, there comes a point where that effect—at best a prediction—cannot, with confidence, justify invalidating a statute on its face and so prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe.

413 U.S. at 615.

The question therefore is not, as the court below conceived it, whether the statute is susceptible to a troubling application or set of applications, but rather whether "these arguably impermissible applications of the statute amount to more than a tiny fraction of the materials within the statute's reach." *Ferber*, 458 U.S. at 773. Conversely, it is clear that this aspect of the substantiality requirement entails proof that the statute is "unconstitutional in a substantial portion of the cases to which it applies." *Regan v. Time, Inc.*, 468 U.S. 641, 650 (1984).[7]

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[7] *See People v. Holder*, 96 Ill. 2d 444, 454, 451 N.E.2d 831, 835 (1983) ("[A]ny such conceivable impermissible applications are

This Court has recently emphasized that such potential applications not only must be *substantial* compared to the law's legitimate applications, they must also be *real*: "[T]he mere fact that one can *conceive* of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge." *Taxpayers For Vincent*, 466 U.S. at 800 (emphasis added).[8] Thus, in *Taxpayers For Vincent*, this Court rejected an overbreadth challenge based on the "assumed effect of the ordinance on third parties," rather than on anything in the record to indicate an effect on interests in free speech. 466 U.S. at 801.

Similarly, in upholding New York City's Human Rights Law just last spring, this Court was unwilling to entertain a facial overbreadth challenge simply because, as a theoretical matter, there might be some parties to whom application of the law would be an unconstitutional infringement of First Amendment rights. Reiterating that the overbreadth doctrine is "strong medicine," this Court opined that: "To succeed [in] its challenge, appellant must demonstrate *from the text of*

dwarfed by the statute's legitimate reach in prohibiting threatened criminal activity").

[8] As other lower courts have construed the post-*Ferber* substantial overbreadth requirement, it is immaterial if a statute may conceivably reach some instances of protected speech. "Defendant may be correct in saying that the literal language of the statute could be interpreted to embrace some protected speech, but this does not suffice to overturn a statute. There is no substantial overbreadth." *United States v. Rogers*, 755 F.2d 533, 543 (7th Cir.), *cert. denied*, 473 U.S. 907 (1985). *See also United States v. Reedy*, 632 F.Supp. 1415, 1421 (W.D. Okla. 1986) (court rejecting argument that 18 U.S.C. § 2551(a) (Supp. 1984) is substantially overbroad because the expression prohibited by the statute is not protected), *aff'd*, 845 F.2d 239 (10th Cir. 1988); *State v. Lance*, 721 P.2d 1258, 1265 (Mont. 1986) ("Although it might be possible that some rare situations will arise in the future, . . . those possible unconstitutional applications of the statute are not sufficient to invalidate it on its face").

the law and from actual fact that a substantial number of instances exist in which the law cannot be applied constitutionally." *New York State Club Association*, 56 U.S.L.W. at 4657 (emphasis added). *See also Boos*, 56 U.S.L.W. at 4254.[9]

The lack of any record in the *New York State Club Association* case demonstrating the existence and specific characteristics of any potential party to whom the law could not constitutionally be applied, coupled with the Court's confidence that New York City's enforcement agency could and would enforce the law in good faith and constitutionally, convinced this Court that a case-by-case analysis of specific facts was appropriate. *New York State Club Association*, 56 U.S.L.W. at 4657. Such an approach is the proper cure where possible instances of invalid application of a statute are comparatively insignificant or merely conceivable. As this Court made clear in *Ferber*, any potential overbreadth should be "cured through case-by-case analysis of the fact situations to which [the statute's] sanctions, assertedly, may not be applied." 458 U.S. at 774.

B. The Court Below Invalidated an Entire Criminal Statute and Reversed Respondent's Conviction Because Conceivable Marginal Applications Might Infringe on Speech Interests, Without Even Considering The Statute's Legitimate Sweep.

In the decision under review, the Supreme Judicial Court of Massachusetts invalidated the Commonwealth's child sexual exploitation statute on First Amendment

[9] This Court's recent cases also clarify that the context and goals of a statute illuminate its reach, and are relevant in determining whether the statute withstands a challenge based on overbreadth or vagueness grounds. *See Boos*, 56 U.S.L.W. at 4259-60; *see also infra* pp. 28-31. For a discussion of the relationship between the overbreadth and vagueness doctrines, *see generally* L. Tribe, American Constitutional Law, § 12-31 at 1033 (1988).

overbreadth grounds because an application of the statute to conduct the court viewed as clearly lawful, such as parental pictures of very young naked children running on the beach, was conceivable. *Commonwealth v. Oakes*, 401 Mass. 602, 605, 518 N.E.2d 836, 838 (1988). Contrary to the clear requirements of the overbreadth doctrine, *see supra* § IA, the court below failed to consider whether such marginal applications are either substantial or real. *See Oakes*, 401 Mass. at 605, 518 N.E.2d at 838.

While the application of section 29A to lawful conduct hypothesized by the court below may be a theoretical possibility, it is one that runs counter to the clear purposes, mandate and context of the statute, issues which the majority below wholly failed to consider. *See infra* § III. The statute is targeted at child sexual exploitation and abuse, evils the Commonwealth has an indisputable and compelling interest in combatting. *See infra* pp. 15-16. That these purposes and the legitimate reach of the statute are well understood is demonstrated by the statute's enforcement history. *See infra* pp. 26-27. The remoteness of the chilling effect feared by the court is clear from the majority's own acknowledgement that "virtually every person would regard" such protected activities as lawful. *Oakes*, 401 Mass. at 605, 518 N.E.2d at 838.

Inexplicably, the majority decision does not examine whether the statute addresses a central core of constitutionally regulable criminal conduct. *See Oakes*, 401 Mass. at 603-604, 518 N.E.2d at 837-838. This failure to consider whether the overbreadth is substantial rests on a mistaken view of federal law. *See Ferber*, 458 U.S. at 771 n.26; *supra* pp. 9-11.

Nor did the majority make any apparent effort to determine whether section 29A is capable of a narrowing construction or severance of the provisions thought to be constitutionally suspect. *See Oakes*, 401 Mass. at 611 n.4, 518 N.E.2d at 841 n.4 (O'Connor, J., dissenting)

("[T]he statute is clearly severable . . . the court's opinion fails to address this issue"). *See generally Ferber*, 458 U.S. at 769 n.24.

The short opinion in the case suggests strongly that once the majority determined that section 29A conceivably criminalized conduct that virtually every person would regard as lawful, such as photographing a naked one-year-old romping in a wading pool, it ceased all other consideration of the statute. As this Court made clear in *Ferber*, however, state courts "should not be compelled to entertain an overbreadth attack when not required to do so by the Constitution." 458 U.S. at 767. This Court "is the final arbiter of whether the Federal Constitution necessitated the invalidation of a state law," *id.*, and can correct the state court's error, just as it did in *Ferber* itself.

II. SECTION 29A DEFINES A CORE OF CRIMINAL CONDUCT THAT THE COMMONWEALTH MAY LEGITIMATELY PROHIBIT.

A. The State Has A Compelling Interest in Preventing Sexual Exploitation Of Children.

This Court has made abundantly clear that a "State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling.'" *Ferber*, 458 U.S. at 756-57 (*citing Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982)). *Ferber* and a multitude of other cases establish that the state has the police power to regulate conduct that affects the health and well-being of minors. *Id.* at 758.[10]

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[10] *See also Bethel School District v. Fraser*, 106 S. Ct. 3159, 3166-67 (1986) (upholding imposition of sanctions by school district upon student as a result of lewd and indecent speech); *F.C.C. v. Pacifica Foundation*, 438 U.S. 726, 742-48, *reh. denied*, 439 U.S. 883 (1978) (upholding administrative regulation of broadcast of patently offensive words dealing with sex where children may hear broadcast); *Paris Adult Theatre I v. Slayton*, 413 U.S. 49, 67 (1973) (state has a legitimate interest in regulating exhibition of

In addition, this Court has specifically recognized that "the use of children as subjects of pornographic materials is harmful to the physiological, emotional and mental health of the child," *Ferber*, 458 U.S. at 758, and has given greater leeway to the states to regulate the distribution of child pornography than it has granted them to regulate adult materials that may not be totally obscene under *Miller v. California*, 413 U.S. 15 (1973). *Ferber*, 458 U.S. at 755-56. In the area of child pornography, this Court has struck the balance of competing interests in favor of the compelling interest in protecting children.

The constitutionality under the First Amendment of laws prohibiting the employment of children in the production of films and photographs that depict sexual activity has never been questioned. *Ferber*, 458 U.S. at 762. As this Court explained in *Ferber*: " 'It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute.' " 458 U.S. at 761-62 (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949)).

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obscene materials in public places, including "adult theatres" from which minors may be excluded); *Ginsburg v. New York*, 390 U.S. 629, 640 (1968) (upholding statute protecting children from obscene periodicals); *Prince v. Massachusetts*, 321 U.S. 158, 170 (1963) (upholding statute prohibiting use of a child to distribute religious literature).

Traditionally, the Supreme Judicial Court of Massachusetts has manifested the same concern shown by this Court for the protection of minors from exploitation. *See, e.g., Custody of a Minor*, 375 Mass. 733, 754, 379 N.E.2d 1053, 1066 (1978) ("the State has a long-standing interest in protecting the welfare of children living within its borders"); *Commonwealth v. King*, 374 Mass. 5, 12 n.3, 372 N.E.2d 196, 201 n.3 (1977) (court notes that one of the reasons for prohibiting prostitution was to protect young uneducated women from exploitation); *Commonwealth v. Gallant*, 373 Mass. 577, 582-583, 369 N.E.2d 707, 711-712 (1977) (court points out the long history of legislation protecting female children under age sixteen from consenting to sexual intercourse).

Cf. Arcara v. Cloud Books, Inc., 106 S. Ct. 3172, 3177 (1986) (the incidental effect on an anti-prostitution statute on operation of a bookstore failed to raise significant First Amendment concerns).

Courts that have reviewed statutes, like section 29A, designed to prevent the sexual abuse and exploitation of children in the production of child pornography have considered those production statutes to be easily capable of withstanding attacks on First Amendment grounds, in contrast to distribution statutes, like the New York statute upheld in *Ferber*, which may present more difficult First Amendment questions. Thus, in *United States v. Reedy*, 632 F. Supp. 1415, 1418-1419 (W.D. Okla. 1986), *aff'd*, 845 F. 2d 239 (10th Cir. 1988), the court had no difficulty in upholding 18 U.S.C. § 2251(a) (Supp. 1984), which makes illegal the inducement of children into sexual conduct for the purpose of making visual representations of sexual conduct: "[R]egulations governing activities of distributors of child pornography may be viewed with greater constitutional scrutiny than those regulating activities of coercers and producers, because the latter are considered to regulate primarily conduct and only incidentally speech." *See also United States v. Smith*, 795 F. 2d 841, 845 (9th Cir. 1986) (also upholding 18 U.S.C. § 2251(a) (Supp. 1984)), *cert. denied*, 107 S. Ct. 1964 (1987).[11]

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[11] Many state courts have similarly concluded that sexual exploitation of minors is not protected expression or speech. *See, e.g., Griffin v. State*, 396 So. 2d 152 (Fla. 1981) (statute dealing with use of minors in pornography "does not proscribe constitutionally protected speech or activities, but prohibits specific conduct relating to minors"); *Payne v. Commonwealth*, 623 S.W. 2d 867, 871 (Ky. 1981), ("The Courts clearly distinguish such statutes protecting a minor from actual use in a sexual performance. Such con-

B. The Production Of Photographs That Depict Children Engaged In Sexual Activity Or Posed In A State Of Nudity Is Sexual Exploitation.

The production of child pornography is itself child sexual abuse. As this Court recognized in *Ferber*: "The use of children as . . . subjects of pornographic material is very harmful to both the children and the society as a whole." 458 U.S. at 758 n.9. Abusers often produce child pornography in conjunction with their own sexual activity. *See* Lanning and Burgess, *Child Pornography and Sex Rings*, Fed. Bur. Inv. Law Enforcement Bull. at 13 (1984). The tie between sexual abuse and child pornography is so well established that the Attorney General of the United States has recommended that local and federal prosecutors ask child victims of sexual abuse whether photographs or films were made during the course of the abuse. U.S. Dept. of Justice, Attorney General's Comm'n on Pornography, Final Report (1986) at 696 [hereinafter referred to as "Attorney General's Report"].

It is important to recognize that manipulating, enticing, soliciting or coercing the posing of a child in a state of nudity is harmful to and sexually exploitive of the child even if the product is not legally obscene.[12] A.W.

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duct does not give rise to the same special free speech protection given the film or other media"), *cert. denied*, 456 U.S. 909 (1986); *State v. Helgoth*, 691 S.W. 2d 281 (Mo. 1985) (the activity engaged in by the defendant and prohibited by the statute is distinctly conduct, as contrasted with speech), *pet. for writ of habeas corpus denied*, 640 F. Supp. 1251 (E.D. Mo. 1986); *People v. Folk*, 109 Misc. 2d 738, 440 N.Y.S. 2d 984, 986 (1981) (state's interest in protecting juveniles from psychological or physical harm outweighs First Amendment concerns); *State v. Jordan*, 665 P.2d 1281, 1284 (Utah 1983) (sexual exploitation of minors is not protected expression or speech), *app. dism.*, 464 U.S. 910 (1983); *Freeman v. Commonwealth*, 288 S.E.2d 461, 464-65 (Va. 1982) (production of photographs of nude five-year old not protected speech).

[12] Unlike adults, children cannot give informed consent to the production or distribution of sexually exploitive photographs.

Burgess, *Child Pornography And Sex Rings* at 14; *see Ferber*, 458 U.S. at 758 n.9. "Child molesters frequently engage in acts that are behavorially, if not legally sexual acts. Seemingly normal acts, such as photographing children, touching children, wrestling with children, or even looking at children can be sexual acts for some individuals." Lanning, *Child Molesters: A Behavioral Analysis*, Nat'l Center for Missing and Exploited Children 33 (1987).

"At the very least, production of pornography involves posing a child in a suggestive fashion and in circumstances likely to cause nervousness, shame and anxiety." Potuto, *Stanley + Ferber = Constitutional Crime of At-Home Child Pornography Possession*, 76 Ky. L. J. 15, 39-40 (1987). "There are legitimate questions about when 'mere' nudity stops being 'mere' nudity and has such clear connotations of sexual activity that it ought at least to be analyzed according to the same factors that [the Commission on Pornography] discuss[es] with respect to sexually explicit materials containing neither violence nor degradation." Attorney General's Report at 347.

Significantly, also, whether a photograph depicts "mere nudity" or actual sexual conduct may be irrelevant from the perspective of the child who has been manipulated or coerced into its production.[13] In terms of the harm suffered by the child who has been coerced, manipulated or enticed into disrobing and posing, a photograph that

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People v. Spargo, 103 Ill. App.3d 280, 59 Ill. D. 8, 431 N.E.2d 27, 31 (1982). *Cf. Bellotti v. Baird*, 443 U.S. 622, 634-37 (1979) (inability of children to make decisions in an "informed, mature manner").

[13] While this Court has indicated that an ordinance that broadly prohibited the showing of films containing simple nudity is unconstitutionally overbroad, *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 215 (1975), it has never held that compelling a child to pose nude is protected.

might meet a typical statutory definition of "sexual conduct" [14] because the photographer aimed the camera primarily at the child's genitals is not distinguishable from a photograph of a child's torso that merely includes the child's genitals in view.

Thus, regardless whether the photograph depicts actual sexual activity or the exhibition of a child nude, a child who has been forced to pose in a state of nudity has been victimized: she has been conditioned to respond as a sexual object; she may have been seduced; and she may have been physically molested.[15] In the short term, the effects of the victimization may be "depression, suicidal thoughts, feelings of shame, guilt, alienation from family and peers, and massive acute anxiety." Attorney General's Report at 613 n.454 (citing U. Schoettle, Report to the United States Attorney General's Commission on Pornography at 11 (Miami hearing)). In the long term, many victims are "likely [to] suffer a repetition of the abuse cycle (this time as the abuser), chronic low self esteem, depression, anxiety regarding sexuality, role confusion an fragmented sense of the self, and possible entry into delinquency or prostitution." *Id.* Experts "seem

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[14] *See, e.g.*, "lascivious exhibition of the genitals," 18 U.S.C. § 2255.

[15] What is depicted in the photograph may be only the least of the sexual activity that actually occurred. "Most of [the] harm results from sexual molestation from adults, whether it is recorded on film or not. Even if the child is photographed alone or with other children in simulated acts, the producers of the visual material often engage in sexual activity with the child before and after photographing. Thus, the absence of adults in the visual material does not mean that the child has not been sexually assaulted by an adult." Note, *Protection of Children From Use in Pornography: Toward Constitutional and Enforceable Legislation*, 12 U. Mich. J. L. Ref. 295, 300 and nn.35-36 (1979) (citing Sexual Exploitation of Children: Hearings Before the Subcommittee on Crime of the House Committee on the Judiciary, 95th Cong., 1st Sess. at 59, 114). Indeed, Oakes himself was indicted but acquitted of four counts of rape. *See supra* note 5.

unable to unravel the harm caused by the child pornography alone from the harm derived from the collective abuse—the enticement or desensitizing, the participation in the sexual activity, the selling and the trading of children on an underground pornography market, and the harm caused by the permanence of the record." *Potuto, Stanley + Ferber, supra* at 38-39.

In addition to the harm suffered by children who are coerced, used and manipulated into the production of nude or sexually explicit photographs, the pictures that result from this sexual exploitation are inherently harmful to children. Public exposure of the child's body and involvement in sexual activity may result in emotional damage beyond the physical damage incurred in the actual photographing. *Ferber*, 458 U.S. at 758 nn.9-10. The child subject of the photograph knows that there is a record of her sexual abuse; that the photograph is in circulation; and that its existence may affect her future. *See id.* at 758 n.10.[16] Nudity is embarrassing to many children and is not the norm. One recognized expert confirmed in a study the idea that:

> [M]odesty is still in fashion. Nudity in front of parents or siblings is not the norm among twelve year old Americans . . . In the most uncomfortable situation, between a father and a daughter, 95% of the girls said they would be embarrassed. Across the whole spectrum, family members are more often embarrassed to be naked than not.

D. Finkelhor, *The Sexual Climate of Families*, University of New Hampshire at 8 (1983).

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[16] Children who have been the subject of nude or sexually explicit photographs have a privacy interest in having the photographs shielded from the view of others. *Ferber*, 458 U.S. at 759 n.10. *See, e.g., Faloona v. Hustler*, 607 F. Supp. 1341 (N.D. Tex. 1985) (children have privacy interest in release for publication of nude photographs), *aff'd*, 799 F.2d 100 (5th Cir. 1986), *cert. denied*, 107 S. Ct. 1295 (1987); *Shields v. Gross*, 461 N.Y.S.2d 254, 448 N.E.2d 108 (1982) (same).

The nude or sexually explicit photographs that result from the sexual exploitation of children are also harmful in that they condone and promote a distorted view of sexuality, often by pairing the themes of sexuality and violence. For example, it has been documented that the three most widely-read, mainstream "soft-core" erotica/pornography magazines, *Playboy*, *Penthouse*, and *Hustler*, depict children in both sexual and nonsexual ways, depict sexual and nonsexual crime and violence, and commonly pair these themes with images of adult female nudity and overt sexual activity. U.S. Dept. of Justice, Office of Juv. Justice and Delinquency Prevention, Exec. Summ., Pro. No. 84-JN-AX-K007 (1987) (hereinafter "Executive Summary").[17] The principal researcher also found that children were depicted as viable targets of sexual and nonsexual abuse and as desiring adult sexual interactions. The report concluded:

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[17] The study identified three basic themes: nonsexual, nonviolent activities such as simple memories; violent activities such as murder, maiming or surgical procedures; and sexual activities such as intercourse or a child appearing nude . . . .

Findings included the following:

* 1.675 child images were associated with nudity.

* 1,225 child images were associated with genital activity.

* 989 child images were associated with adults.

792 adults were portrayed as pseudo-children.

* 592 child images were associated with force.

* 267 child images were associated with sex with animals or objects.

* 51% of the child cartoons and 46% of the child photographs showed children age 3-11.

. . .

* Almost all depictions of child sexual abuse portrayed the child as unharmed or benefited by the activity.

From 1954 to 1984, these 6,004 images of children were interspersed with 15,000 images of crime and violence, 35,000 female breasts and 9,000 female genitalia. Executive Summary at 3.

> [I]t appears of compelling public concern that the present research documents a contextual association of three discrete stimuli: (1) adult female nudity and graphic female sexual display, (2) neutral, sexual and violent child depictions, and (3) depictions of crime and violence. The magazine genre evidences a unified culture and world view which incorporates all three stimuli: pairing the arousal to an adult sexual object with child sexualization and crime and violence. Thus it is not unlikely that some vulnerable juvenile and adult receivers may fuse child depictions with arousal to sex (genital stimulus) and/or arousal to violence (aggressive stimulus).

Executive Summary at 9-10. The findings were disturbing enough that the author of the report recommended a voluntary moratorium of child depictions by mainstream erotica/pornography publications until more data on the harm to children could be obtained and evaluated. *Id.* at 10.

The photographic record of the sexual exploitation of the child is also harmful in that such photographs often are used by pedophiles[18] to lower other children's inhibitions.[19] "Peer pressure has a tremendous effect on chil-

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[18] The term pedophilia is defined by the American Psychiatric Association as "the act or fantasy of engaging in sexual activity with pre-pubertal children as a repeatedly preferred or exclusive method of achieving sexual excitement." American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders III*, Revised Third Edition § 302.20 (1987). Webster's New Collegiate Dictionary at 838 (1979) defines the term as "sexual perversion in which children are the preferred sexual object." Many child molesters are pedophiles and many pedophiles are child molesters, but the terms are not interchangeable. Lanning, *Child Molesters: A Behavioral Analysis, supra* at 1-2.

[19] The pedophile's fascination with child pornography admits of no distinction between photographs of children in sexually explicit positions or in a state of nudity. Typically, pedophiles take and use photographs of children in both sexual and nonsexual poses. Lanning and Burgess, *Child Pornography and Sex Rings*, Fed. Bur. Inv. Law Enforcement Bull. at 13 (1984) and both unclothed and

dren . . . [i]f other children are involved, maybe it is all right, the child thinks. In the pornography used to lower inhibitions, the child portrayed will appear to be having a good time." *Effect of Pornography on Women and Children*, 1984: Hearings on S. Hrg. 98-1267 Before the Subcomm. on Juv. Justice, 98th Cong., 2d Sess. at 38 (1984) (testimony of Kenneth V. Lanning). Further, in most cases coming to the attention of law enforcers, "the arousal and fantasy fueled by the pornography is only a prelude to actual sexual activity with children." A.W. Burgess, *Child Pornography and Sex Rings* at 86 (1984).

In summary, whether the photograph depicts the child in a sexually explicit position, in a position that suggests sexual activity, or in a state of nudity, the photograph is an instrument of sexual exploitation as well as an indication that sexual exploitation has occurred.

C. Section 29A Is A Child Sexual Exploitation Statute, Enacted As Part Of An Overall Scheme To Protect The Commonwealth's Children, Which Reflects The Realities of Child Sexual Abuse.

Section 29A provides:

> whoever . . . hires, coerces, solicits or entices, employs, procures, uses, causes, encourages, or knowingly permits a child to pose or be exhibited in a state of nudity or to participate or engage in any act that depicts, describes or represents sexual conduct for purposes of visual representation . . . [shall be punished . . . .]

The statute is part of an overall scheme of laws designed to protect children from sexual abuse and exploitation

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clothed, Sen. Comm. of Governmental Affairs, Perm. Sub. Comm., 99th Cong., 2d Sess., Rep. No. 99-537, Child Pornography and Pedophelia at 11 (1986).

such as rape, incest, and prostitution that the state could enact pursuant to its police powers.[20]

The tenor and focus of section 29A is the regulation of conduct that sexually exploits children.[21] The statute is not primarily concerned with the effect of child pornography upon the viewer.[22] Rather, it addresses the mental and physical well-being of children who are used as models and subjects of pornography. *Cf. Ferber*, 458 U.S. at 761 (whether the work "appeals to the prurient interest of the average person bears no connection to the issue of whether a child has been physically or psychologically harmed in the production of the work"); *United States v. Freeman*, 806 F. 2d 1290, 1292 (8th Cir.)

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[20] *See, e.g.*, Mass. Gen. Laws Ann. ch. 265, § 13B (indecent assault and battery of a child under fourteen); Mass. Gen. Laws Ann. ch. 265, § 14 (indecent assault and battery of a child of fourteen); Mass. Gen. Laws Ann. ch. 265, § 22A (rape of a child under sixteen, with force); Mass. Gen. Laws Ann. ch. 265, § 23 (rape of a child under sixteen); Mass. Gen. Laws Ann. ch. 265, § 24B (assault with intent to rape a child less than sixteen); Mass. Gen. Laws Ann. ch. 265, § 26A (kidnapping of a relative); Mass. Gen. Laws Ann. ch. 272, § 1 (enticement of child under sixteen for marriage); Mass. Gen. Laws Ann. ch. 272, § 4 (inducement of child under eighteen for sexual intercourse); Mass. Gen. Laws Ann. ch. 272, § 4B (inducement of child under eighteen to become a prostitute); Mass. Gen. Laws Ann. ch. 272, § 28 (dissemination of obscene materials to minors); Mass. Gen. Laws Ann. ch. 272, § 29B (dissemination of child pornography); Mass. Gen. Laws Ann. ch. 272, § 35A (unnatural or lascivious acts with a child under sixteen); Mass. Gen. Laws Ann. ch. 272, § 33 (exhibition of deformed minor); Mass. Gen. Laws Ann. ch. 119, § 51B (reporting of child abuse).

[21] In contrast, the focus of a companion statute, Mass. Gen. Laws Ann. ch. 272, § 29B (West Supp. 1987) is the prevention of the sexual exploitation of minors through the regulation of the distribution of child pornography.

[22] But child pornography may indeed have a harmful effect on viewers—either potential abusers or children they are attempting to manipulate. *See supra* pp. 21-24; *cf. Erzoznick v. City of Jacksonville*, 422 U.S. 205, 213 (1973).

("Whereas obscenity laws are designed to protect the unwilling recipient from offensive sexual depictions (citation omitted) child pornography laws also seek to protect innocent children from sexual exploitation and its potentially permanent psychological and physical effects"), *cert. denied*, 107 S. Ct. 1384 (1987).

Section 29A seeks to prevent sexual exploitation by prohibiting the hiring, coercing, soliciting, or enticing of a child to pose in a state of nudity or to engage in sexual activity for the purpose of producing a visual representation. The verbs chosen to describe the conduct that is proscribed describe exploitive conduct, not speech. The verbs in section 29A parallel those describing the conduct proscribed in other child exploitation statutes, for example: "*enticement* of child under 16 for marriage," Mass. Gen. Laws Ann. ch. 272, § 1; "*inducement* of child under 18 to become a prostitute," Mass. Gen. Laws Ann. ch. 272, § 4B; "*employment* of child under fifteen to beg," Mass. Gen. Laws Ann. ch. 272, § 58 (emphasis added). The statute includes sanctions against "whoever," including parents, "knowingly permits" the child to pose in a state of nudity or to participate in sexual acts. This language, like its federal counterpart, is aimed at preventing those with parental or custodial control from knowingly permitting the abuse of a child by another.[23] As with all of the other phrases which describe the conduct that is prohibited under section 29A, this prohibition reflects the state's concern that the immaturity of minors not be damagingly exploited for the gratification or profit of another person.

The history of the statute's enforcement indicates that the statute reflects the reality of child sexual abuse. *See*

[23] *See* 18 U.S.C. § 2251(b) (West 1984) ("any parent, legal guardian, or person having custody or control of a minor who knowingly permits such minor to engage in, or to assist any other person to engage in sexually explicit conduct for the purpose of producing any visual depiction of such conduct shall be punished").

infra pp. 29-31. Indictments under section 29A typically arise in conjunction with indictments for other sexual offenses such as rape of a child and indecent assault and battery, and not in isolation.[24] Twenty-six out of the twenty-nine known cases for which indictments under section 29A were returned were accompanied by charges of rape of a child or indecent assault and battery of a minor, or both. *See* Appendix, pp. 1a-8a.

Thus as a practical, historical, and empirical matter, section 29A covers a whole range of conduct that is "easily identifiable and constitutionally proscribable." *Ferber*, 458 U.S. at 770 n.25. Both on its face and in its practical application, the essential scope of the statute's "sweep" in combatting sexual exploitation of minors is "plainly legitimate." *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973).

III. THE CONCEIVABLE MARGINAL INFRINGEMENTS OF SPEECH INTERESTS HYPOTHESIZED BY THE COURT BELOW ARE UNREALISTIC AND DO NOT PRESENT A SERIOUS THREAT TO FIRST AMENDMENT EXPRESSION.

The lower court in the present case was overwhelmingly and unjustifiably concerned that section 29A could be read as prohibiting benign parental pictures of young naked children, or the use of child models in the production of "some of the world's greatest paintings." *Oakes*, 401 Mass. at 605 n.3, 518 N.E.2d at 838 n.3. Neither concern justifies invalidating the statute on its face.

[24] One Massachusetts study of child sexual abuse victims indicates that seventy-four percent of the victims studied were subjected to more than one form of abuse; that three percent of the girls and six percent of the boys were forced to pose for child pornography; and that thirteen percent of the girls and forty percent of the boys were forced to watch pornography. Department of Social Services, MA, Report, Services to Sexually Abused Children And Their Families, Part II at 20 (1987).

The purpose of the First Amendment overbreadth doctrine is to avoid the chilling effect that broadly worded statutes can have upon the exercise of freedom of expression. *Ferber*, 458 U.S. at 768. That purpose is not served, however, where the threat of a chilling effect is neither real nor substantial. *Id.* at 769-70; *see supra* pp. 9-15. To strike down a statute which protects the state's citizens against child exploitation without any tangible impact upon First Amendment values constitutes a perversion of the overbreadth doctrine and serves no legitimate purpose.

In this case, the unreality of the court's suggestion that the statute might be used to prosecute benign family-album photographs of infants or toddlers is obvious, and the application of the statute to legitimate artistic expression is entirely theoretical. The plain intent of section 29A, particularly when read in context, *see supra* pp. 24-27, is to prohibit the production of child pornography and the coercive or manipulated sexual exploitation of children.[25]

The opinion below itself recognized that *nobody* would think that taking family-album-type pictures of infants and toddlers was unlawful, *Oakes*, 401 Mass. at 605, 518 N.E.2d at 838; the necessary corollary of this indisputable observation is that the statute does *not*, in fact, have a chilling effect upon such benign conduct. The concern of the majority below with respect to the possibility of chilling artistic expression is similarly unfounded.[26] Section 29A includes a statutory defense which expressly protects a "visual presentation or production of any posture or exhibition in a state of nudity . . . produced . . . for a bona fide scientific or medical purpose, or for an educational or cultural purpose for a bona fide school, museum or library." Mass. Gen. Laws Ann. ch. 272, § 29A (West Supp. 1987)."[27] Section 29A involves child pornography and the sexual exploitation of children, not legitimate artistic expression.

Moreover, the statute's enforcement history belies any notion that the Commonwealth or its prosecutors have had any difficulty in interpreting section 29A well within constitutional boundaries. The petitioner is aware of no cases in Massachusetts that involve prosecutions under section 29A for the taking of innocent family-album-type photographs of children or anything resembling legitimate art. In addition, available statistics establish that section 29A has been used only to prohibit the production of photographs that engender a serious likelihood of harm to children. *See* Appendix; *see also supra* pp. 26-27.[28] As this Court has made clear, it is relevant in a First Amendment challenge to consider how a statute has been applied. *See Brockett v. Spokane Arcades, Inc.*, 472 U.S.

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[25] As this Court recently affirmed, where a governmental regulation permits some ambiguous construction, the goals of the regulation may illuminate its likely application. *Frisby v. Schultz*, 56 U.S.L.W. 4785, 4788 (U.S. June 29, 1988). Similarly, in *Boos v. Barry*, this Court held that a First Amendment vagueness challenge was not established where, as here, "the particular context" of the statute "communicates its reach in words of common understanding." 56 U.S.L.W. 4254, 4260 (U.S. March 22, 1988); *see also Grayned v. Rockford*, 408 U.S. 104, 112 (1972) (particular context of ordinance regulating disturbance of the peace in schools gave fair notice of its scope).

[26] *Cf. Ferber*, 458 U.S. at 773. Although the definition of child sexual exploitation and pornography in section 29A is slightly more expansive than in the statute at issue in *Ferber*, First Amendment concerns are more attenuated here because section 29A regulates production rather than dissemination. *See supra* pp. 16-17 n.11.

[27] The jury were expressly instructed on this defense but necessarily rejected it when they convicted Oakes. *See infra* p. 33.

[28] Thus, prosecutors have applied the statute only to the type of conduct reflected in its title, "Child Pornography; Enticement, Solicitation, Employment, etc. of Children." Mass. Gen. Laws ch. 272, § 29A (1986). *See also* J.A. at 3a (title on indictment: "Soliciting A Child for Pornographic Purposes").

491, 503 (1985) (citing *Cantwell v. Connecticut*, 310 U.S. 296 (1940) and *Marsh v. Alabama*, 326 U.S. 501, 509 (1946)). *See also Frisby*, 56 U.S.L.W. at 4788 (accepting the representations of town counsel made during oral argument regarding the town's limited intent to enforce as supportive of the Court's disinclination to view the challenged ordinance as fatally overbroad); *Lakewood v. Plain Dealer Publishing Co.*, 56 U.S.L.W. 4611, 4617 n.11 (U.S. June 14, 1988) (well-understood enforcement practice relevant in construing statute even where limits imposed by practice are not evident on face of statute).[29]

For all these reasons, to the extent that section 29A is potentially overbroad in any of its applications, such potential applications would amount to no more than a small fraction of the conduct within the statute's reach. *Cf. Ferber*, 458 U.S. at 773. This, like *Ferber*, presents "the paradigmatic case of a state statute whose legitimate reach dwarfs its arguably impermissible applications." *Id.*[30]

Neither "the text of the law" nor "actual fact," *New York State Club Association*, 56 U.S.L.W. at 4657, support the conclusion that "a substantial number of in-

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[29] In this case, it is not necessary to rely on a mere "hunch" that the state will "probably not enforce" the statute against individuals who take innocuous photographs. *Cf. Frisby*, 56 U.S.L.W. at 4792 (Stevens, J., dissenting). Rather, the Court may rely upon the history of enforcement for the proposition that the statute is being enforced in cases where sexual exploitation is thought to be present. *See supra* pp. ———.

[30] On July 15, 1988, the Massachusetts General Court enacted, subject to the Governor's signature, H. 5555, an amendment to section 29A. However, this amendment is not certain to validate pre-*Oakes* convictions or reach conduct that occurred before enactment of the amendment. *See Weaver v. Graham*, 450 U.S. 24, 28-29 (1981); Sutherland Statutory Construction § 2.07 nn.9, 15-18 (4th ed. 1985). *Cf. Frisby*, 56 U.S.L.W. at 4792 (Stevens, J., dissenting).

stances exist in which the law cannot be applied constitutionally." *Id.* Had the court below properly applied the overbreadth doctrine, it would have been compelled to conclude that potential overbreadth could be cured through case-by-case adjudication. Plainly, the conceivable marginal infringements on speech interests the court hypothesized do not justify striking down section 29A as invalid on its face.

IV. THE RESPONDENT'S CONDUCT IN TAKING NUDE PHOTOGRAPHS OF HIS FOURTEEN-YEAR-OLD STEPDAUGHTER WAS SEXUALLY EXPLOITIVE, CRIMINAL, AND FELL WELL WITHIN A PERMISSIBLE RANGE OF APPLICATIONS OF G.L. ch. 272, SECTION 29A.

It remains only to consider whether the conduct of respondent Oakes was criminal, sexually exploitive, and fell within the scope of activity that section 29A constitutionally prohibits.[31] Little serious doubt on this point should linger.

The photographs depict a fourteen-year-old girl, nude, wearing only a red scarf and red and white bikini underpants, and in Playboy-type poses selected by the respondent. Tr. 24-26, 28; J.A. 20a-23a, 24a-25a; *see also* Exhibits 1-10. All of the photographs emphasize the vic-

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[31] The majority below expressly did not decide whether Oakes could constitutionally be punished for taking the sexually suggestive nude photographs of his fourteen-year-old stepdaughter in secret. *Oakes*, 401 Mass. at 603, 518 N.E.2d at 837 ("We need not decide whether the Supreme Court would sustain a statute that was carefully directed against the defendant's conduct . . ."); *id.* at 604, 518 N.E.2d at 837 ("There is at least a substantial question whether an important governmental interest would warrant overriding First Amendment freedoms in this case . . ."); *id.* at 604, 518 N.E.2d at 837 ("Even if we assume that an important governmental interest would justify punishment for the defendant's behavior in this case . . ."); *id.* at 605, 518 N.E.2d at 838 ("[E]ven if what the defendant did in this case could properly be criminalized (a matter we need not decide)").

tim's breasts. In some, she is depicted leaning back so that her breasts are the focal point of the photograph. The poses, chosen by Oakes, are obviously contrived and are either sexual or sexually suggestive. They do not depict the way a child ordinarily sits, reclines, or is positioned for a photograph. In some of the photographs, the victim assumes a coy or sexually suggestive attitude. The nature of the activity is clearly one that the statute is designed to reach and would meet, by analogy, a "lewd" or "lascivious" test.[32]

Second, the photographs caused the victim humiliation and embarrassment. When she saw them she tore them up and threw them away in the woods. Oakes, however, forced her to retrieve them and then lay them on the kitchen table to dry. Tr. 27; J.A. 24a.

Third, in order to convict, the jury had to find that there was no legitimate purpose for the photographs. The jury rejected any suggestion that Oakes took the nude photographs for a legitimate educational, cultural, scientific, or medical purpose when it convicted Oakes. *See* Jury Instructions, Tr. 104; J.A. 13a. The victim had been told that she needed a portfolio of photographs of herself in clothes—skirts and dresses—and she had

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[32] *Cf. United States v. Smith*, 795 F.2d 841, 844 (9th Cir. 1986) (photographs of teenagers in various stages of nudity constituted "lascivious exhibition of the genitals" within the meaning of federal child pornography statute, 18 U.S.C. § 2255); *United States v. Dost*, 636 F. Supp. 828 (S.D. Cal. 1986) (nude photographs of ten-year-old girl on the beach and of fourteen-year-old in a variety of positions displaying breasts and genitals were "lascivious" within meaning of 18 U.S.C. § 2255), *aff'd sub nom. United States v. Wiegand*, 812 F.2d 1239 (9th Cir. 1987); *United States v. Nemuras*, 567 F. Supp. 87, 89 (D. Md. 1983) (photographs of nude or partially clothed children posed in such a way as to depict or suggest willingness to engage in sexual activity constituted a "lewd exhibition of genital area"), *aff'd*, 740 F.2d 286 (4th Cir. 1984); *People v. Lerch*, 134 Ill. App. 3d 643, 89 Ill. Dec. 510, 480 N.E. 2d 1253, 1259 (1985) (photographs of child in which genitals were fully exposed and were focal point of photograph and where poses were contrived, were lewd).

hired a professional photographer to prepare one. Tr. 30, 40; J.A. 27a-28a, 37a-38a. The photographer told Oakes to take photographs of the victim in one-piece outfits, not bikinis. Tr. 62. Nevertheless, Oakes began to take photographs of the victim in increasingly revealing states of undress including clothes from Fredericks of Hollywood. Tr. 24-25, 37, 68; J.A. 21a, 34a-35a. Ultimately, he took the photographs of the victim nude (Tr. 25; J.A. 22a), telling her that he wanted to "make [her] big for Playboy." Tr. 28; J.A. 25a.

Finally, the photographs were produced under circumstances involving coerciveness, secrecy, and enticement, the very circumstances that the statute seeks to regulate. Although the victim's mother knew that Oakes was taking photographs of the victim clothed, she did not know about the nude photographs. Tr. 37; J.A. 34a. The photographs were taken secretly in the basement and kept hidden from view. They were not put in the victim's portfolio but were kept in a locked safe (Tr. 45; J.A. 43a) and in a false ceiling in the basement. Tr. 36; J.A. 34a.

It is telling that Oakes did not, at trial, try to defend the propriety of his conduct. No suggestion was raised nor did the jury find that there was anything benign or artistic about his conduct. Tr. 57-61. Instead, his defense was that he never took these photographs. Tr. 58.

These facts make clear that section 29A is constitutional as applied to Oakes. This was conduct that the state can legitimately criminalize and that bears no resemblance to the marginal applications of the statute hypothesized by the court below.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Judicial Court should be reversed and the conviction should be reinstated.

Respectfully submitted,

JAMES M. SHANNON *
Attorney General
Commonwealth of Massachusetts

PHYLLIS N. SEGAL
A. JOHN PAPPALARDO
Deputy Attorneys General

MADELYN F. WESSEL
JUDY G. ZEPRUN
H. REED WITHERBY
Assistant Attorneys General
One Ashburton Place, Rm. 2001
Boston, Massachusetts 02108
Tel.: 617-727-2200

* Counsel of Record

DATED: July 21, 1988

APPENDIX

APPENDIX

The following information was obtained in a survey conducted by the Attorney General about prosecutions under Mass. Gen. Laws ch. 272, § 29A since its enactment .

I. *PLYMOUTH COUNTY*

Ind. No.	*Charge* *	*Disposition* *
Defendant 1		
84612	Rape/Child/Force	Pending
84613	Rape/Child/Force	Pending
84614	Rape/Child/Force	Pending
84615	Ind A&B/U/14	Pending
84618	Rape/Child	Pending
84619	272, § 29A	Pending
Defendant 2		
82172	272, § 29A	life, 10 yrs, ss prob.; App. Div.: 6-20, CJ
82173	272, § 29A	10-20, CJ
82174	272, § 29A	10-20, CJ
82175	272, § 29A	10-20, CJ
82176	Ind A&B	9-10, CJ
82177	272, § 29A	9-10, CJ
82178	272, § 29A	9-10, CJ
82179	272, § 29A	7-9, CJ, all sentences to be served conc w 82172
Defendant 3		
83346	Rape/Child/Force	life, CJ
83347	A&B	
83348	Rape/Child	30-50, CJ, conc w life
83349	Ind A&B	3-5, CJ, conc w life
83350	Rape/Child	30-50, CJ, consec to life
83351	Ind A&B	n/p mid-trial
83352	Rape	n/p mid-trial
83353	Rape (2 cts)	(1) 7-10 conc; (2) N/G
83354	Ind A&B	3-5, CJ, conc
83355	Rape/Child	30-50, CJ, conc
83356	272, § 29A	dismissed under *Oakes*
83357	Ind A&B	3-5, CJ, conc
83358	Ind A&B	3-5, CJ, conc
83359	Ind A&B	3-5, CJ, conc

* Explanation of abbreviations appear on pp. 9a-10a.

Ind. No.	*Charge*	*Disposition*
83360	Ind A&B	3-5, CJ, conc
83382	Ind A&B	3-5, CJ, conc

II. *BRISTOL COUNTY*

Defendant 4

16641	Rape/Child	filed w/o ch. plea
16642	Ind A&B/U/14	G; 2½ HC, 1 to be served; 3 yrs prob.
16643	272, § 29A	filed w/o change of plea
16644	poss. class D	filed w/o ch. plea

Defendant 5

18120	Rape/Child (2 cts)	G; 12-15, CJ
18121	Ind A&B/U/14 (3 cts) (second offense)	G; 12-15, CJ, conc
18122	Dissemination of Matter Harmful to Minor	n/p
18123	272, § 29A	n/p

Defendant 6

17466	Rape/Child (2 cts)	4 yrs prob.
17467	Ind A&B/U/14	4 yrs prob.
17469	Unnat'l Act w/Child (2 cts)	4 yrs prob.
17470	Ind A&B	4 yrs prob.
17468	272, § 29A	n/p

Defendant 7

17780	Rape/Child	G; 3-5, CJ, 3 yrs prob.
17781	Ind A&B/U/14 (2 cts)	3-5, CJ, conc
17782	272, § 29A	filed w/o ch. of plea

Defendant 8

17420	272, § 29A	Defendant in Default

III. *BERKSHIRE COUNTY*

Defendant 9

17270	Rape/Child	G; 2½HC
17271	Ind A&B/U/14	G; 2½HC

Ind. No.	*Charge*	*Disposition*
17272	Ind A&B/U/14	G; 2½HC
17273	Ind A&B/U/14	G; 2½HC
17274	Ind A&B/U/14	G; 2½HC
17275	Ind A&B/U/14	G; 2½HC
17276	Ind A&B/U/14	G; 2½HC
17277	Ind A&B/U/14	G; 2½HC
17278	Ind A&B/U/14	G; 2½HC
17279	Ind A&B/U/14	G; 2½HC
17280	Ind A&B/U/14	G; 2½HC
17281	Ind A&B/U/14	G; 2½HC (all sentences conc w 17270)
17282	272, § 29B	G; placed on file
17283	272, § 29A	10-12, CJ, ss, 3 yrs prob., on and after 17271
17284	272, § 29A	10-12, CJ, ss, 3 yrs prob , conc w 17283
17285	Asslt w/Int Rape	G; placed on file
17286	A&B	G; placed on file

Defendant 10

17090	272, § 29A	1 yr inf. prob.
17091	272, § 29A	1 yr inf. prob.
17965	Rape	5-7, CJ
17966	Rape	5-7, CJ
17967	272, § 29A	10-12, CJ, ss, w 2 yrs prob.
17968	272, § 29A	same, conc
17969	272, § 29A	same
17970	open + gross lewdness	2½-2-3, CJ, conc w 17965
17971	same	same
17972	Ind A&B/U/14	5-7, CJ, conc w 17965
17973	Ind A&B/U/14	same
17974	Ind A&B/U/14	same

IV. *MIDDLESEX COUNTY*

Defendant 11

86-2140	Rape/Child/Force	20 yrs/Concord
86-2141	Rape/Child/Force	Dism.
86-2142	Rape/Child/Force	20 yrs/Concord, conc
86-2143	Rape/Child/Force	20 yrs/Concord, conc
86-2144	Ind A&B/U/14	10 yrs/Concord, conc
86-2145	Ind A&B/U/14	10 yrs/Concord, conc
86-2146	Ind A&B/U/14	10 yrs/Concord, conc
86-2147	272, § 29A	G; placed on file

Ind. No.	*Charge*	*Disposition*
Defendant 12		
87-1132	Rape	15-20, CJ
87-1133	Rape	15-20, CJ, conc
87-1134	Rape/Child	filed w/o change of plea
87-1135	272, § 29A	filed w/o change of plea
Defendant 13		
86-2659	Rape/Child/Force (11 cts)	NG
86-2660	Ind A&B/U/14 (6 cts)	1 yr H/C
86-2661	Kidnapping (2 cts)	NG
86-2662	A&B (6 cts)	NG
86-2663	272, § 29A (2 cts)	NG
Defendant 14		
87-1328	Rape/Child	6-10, CJ
87-1329	Ind A&B/U/14	6-10, CJ, conc
87-1330	272, § 29A	NG
87-1331	Distribution of Obscene Material	NG
Defendant 15		
86-1976	Rape/Child/Force (3 cts)	7-10, CJ, ss 3 yrs on and after
86-1977	Ind A&B/U/14 (2 cts)	2½ yrs H/C, cmtd
86-1978	Ind A&B (2 cts)	filed w/o change of plea
86-1979	Open & Gross (3 cts)	filed w/o change of plea
86-1980	Unnat'l Act (3 cts)	filed w/o change of plea
86-1981	272, § 29A	filed
Defendant 16		
86-4076	Rape/Child	Pending
86-4077	Rape/Child/Force	Pending
86-4078	Ind A&B/U/14	Pending
86-4079	272, § 29A	Pending
Defendant 17		
87-2074	Rape/Child/Force	Pending
87-2075	Rape/Child/Force	Pending
87-2076	Ind A&B/U/14	Pending

Ind. No.	*Charge*	*Disposition*
87-2077	Ind A&B/U/14	Pending
87-2078	272, § 29A	Dismissed
87-2079	272, § 29A	Dismissed
87-2080	Drugging for Sexual Int.	Pending
87-2081	Drugging for Sexual Int.	Pending
87-2082	Rape/Child/Force	Pending
87-2083	Rape/Child/Force	Pending
87-2084	Ind A&B/U/14	Pending
87-2085	Ind A&B/U/14	Pending
87-2086	Drugging for Sexual Int.	Pending
Defendant 18		
87-3532	Rape/Child/Force	Pending
87-3533	Rape/Child/Force	Pending
87-3534	Rape/Child/Force	Pending
87-3535	Rape/Child/Force	Pending
87-3536	Ind A&B/U/14	Pending
87-3537	Ind A&B/U/14	Pending
87-3538	Ind A&B/U/14	Pending
87-3539	Ind A&B/U/14	Pending
87-3540	272, § 29A	Dismissed
87-3541	272, § 29A	Dismissed
87-3542	272, § 29A	Dismissed
87-3543	272, § 29A	Dismissed
87-3544	Drugging for Sexual Intercourse	Pending
87-3545	Drugging for Sexual Intercourse	Pending
87-3546	Drugging for Sexual Intercourse	Pending
87-3547	Drugging for Sexual Intercourse	Pending
Defendant 19		
85-3785	Rape/Child	Pending
85-3786	272, § 29A	Pending

V. *NORFOLK COUNTY*

Defendant 20		
84001	Rape/Child	20-25, CJ
84002	Rape/Child	20-25, CJ, ss, consec to 84001
84003	Rape/Child	NG

Ind. No.	*Charge*	*Disposition*
84004	Rape/Child	20-25 CJ, conc w 84002
84005	272, § 29A	10-12 CJ, conc w 84001
84006	272, § 29A	10-12 CJ, conc w 84001
84007	Ind A&B/U/14	6-10 CJ, conc w 84002
84008	Ind A&B/U/14	NG
84009	Ind A&B/U/14	6-10, CJ, conc
84010	Ind A&B/U/14	NG
84011	Ind A&B/U/14	6-10, CJ, conc
84012	A W Int Rape	6-10, CJ, conc
84013	A&B	NG
84014	A&B	NG
Defendant 21		
84015	Rape/Ch/Force	5-10, CJ
84016	Rape/Ch/Force	NG
84017	Rape	12-15, CJ, ss, 5 yrs prob., consec to 84015
84018	Ind A&B	9-10, CJ, ss, conc w 84015
84019	Ind A&B	9-10, CJ, ss, conc w 84015
84020	272, § 29A	10-12, CJ, ss, conc w 84015
84021	272, § 29A	10-12, CJ, ss, conc w 84015
84022	A&B	NG
84023	272, § 29A	conviction secured

VI. *HAMPSHIRE COUNTY*

Defendant 22

85-178	272, § 29A (2 cts)	(1) G Plea-10-12 yrs, MCI, CJ ss for 5 years; (2) filed
	272, § 29B	filed

VII. *WORCESTER COUNTY*

Defendant 23

87-0337	272, § 29A	Guilty Plea
87-0338	272, § 29A	Guilty Plea
87-0339	272, § 29A	Guilty Plea
87-0340	272, § 29A	Guilty Plea
87-0341	272, § 29A	Guilty Plea
87-0342	272, § 29A	Guilty Plea
87-0343	272, § 29A	Guilty Plea
87-0344	272, § 29A	Guilty Plea
87-0345	272, § 29A	Guilty Plea
87-0346	272, § 29A	Guilty Plea

Ind. No.	*Charge*	*Disposition*
Defendant 24		
87-107246	272, § 29A	G; 10 yrs Concord
85-107247	Rape/Child	NG
85-107248	Rape/Child	NG
85-107249	Rape/Child	NG
85-107250	Rape/Child	NG

VIII. *SUFFOLK COUNTY*

No cases found.

IX. *BARNSTABLE COUNTY*

No cases found.

X. *ESSEX COUNTY*

Defendant 25

8561	Rape/Child	GP, 8-12, CJ
8563	Rape/Child	GP, 8-12, CJ
8565	Rape/Child	GP, 8-12, CJ
8567	Rape/Child	GP, 8-12, CJ
8569	Rape/Child	GP, 8-12, CJ
8571	Rape/Child	GP, 8-12, CJ all sentences conc w 8561
8560	272, § 29A	GP, 10-15, CJ, ss, 5 yrs prob.
8562	272, § 29A	GP, 10-15, CJ, ss, 5 yrs prob.
8564	272, § 29A	GP, 10-15, CJ, ss, 5 yrs prob.
8566	272, § 29A	GP, 10-15, CJ, ss, 5 yrs prob.
8568	272, § 29A	GP, 10-15, CJ, ss, 5 yrs prob.
	(GP on § 29A cases withdrawn after *Oakes*)	

Defendant 26

10901	Rape/Child	6½-10, CJ
10902	Rape/Child	6½-10, CJ, conc
10903	Ind A&B/U/14	conc, ss
10904	272, § 29A (8 cts)	10-15, CJ
10905	272, § 29A (6 cts)	10-15, CJ
10906	272, § 29A (8 cts)	10-15, CJ (all sentences conc w 10901)

XI. *HAMPDEN COUNTY*

Defendant 27

87-1077	distribution of: LSD to minor	mtn for req. finding allowed.

Ind. No.	*Charge*	*Disposition*
87-1078	cocaine to minor	same
87-1079	amphetamines to minor	same
87-1080	marijuana to minor	same
87-1081	hashish to minor	same
87-1082	272, § 29B	same
87-1083	272, § 29A	same
87-1084	contributing to delinquency of minor	dismissed
87-1085	Rape/Child/Force	mtn. for req. finding allowed
Defendant 28		
87-1322	272, § 29A	dismissed
87-1905	Rape/Child	pending; def. in default
87-1906	Rape/Child	pending; def. in default
87-1907	Ind A&B/U/14	pending; def. in default
87-1908	Ind A&B/U/14	pending; def. in default
87-1909	Ind A&B/U/14	pending; def. in default
87-1910	Intimidating	pending; def. in default
87-1911	Intimidating	pending; def. in default
87-1912	Intimidating	pending; def. in default
87-1318	contributing to delinquency of minor	pending; def. in default
87-1319	contributing to delinquency of minor	pending; def. in default
87-1320	Rape/Child, 2d off	pending; def. in default
87-1321	distribution of cocaine to minor	pending; def. in default
87-1322	272, § 29B	pending; def. in default
Defendant 29		
86-2565	Rape/Child/Force	22-27, CJ
86-2567	Rape/Child/Force	22-27, CJ, conc w 2565
86-2568	Rape/Child/Force	22-27, CJ, conc w 2565
85-2574	272, § 29A	18-20, CJ, conc w 2565
86-2575	272, § 29A	18-20, CJ, conc w 2565
86-2576	272, § 29A	18-20, CJ, conc w 2565
86-2577	272, § 29A	18-20, CJ, conc w 2565
86-2578	272, § 29A	18-20, CJ, conc w 2565
86-2579	272, § 29A	18-20, CJ, conc w 2565
86-2580	272, § 29A	18-20, CJ, conc w 2565

ABBREVIATIONS

Charge	*Statute*
Ind A&B/U/14	Indecent Assault and Battery of a Child Under 14; Mass. Gen. Laws ch. 265, § 13B
Ind A&B	Indecent Assault and Battery; Mass. Gen. Laws ch. 265, § 13H
Rape/Child/Force	Forcible Rape of a Child; Mass. Gen. Laws ch. 265, § 22A
Rape/Child	Rape of a Child; Mass. Gen. Laws ch. 265, § 23
272, § 29A	Soliciting Child for Pornography; Mass. Gen. Laws ch. 272, § 29A
272, § 29B	Dissemination of Visual Material Depicting Minor; Mass. Gen. Laws ch. 272, § 29B
Dissemination of Matter Harmful to Minor	Dissemination of Matter Harmful to Minor; Mass. Gen. Laws, ch. 272, § 28
Unnat'l Act w/Child	Unnatural Act Committed with Child; Mass. Gen. Laws ch. 272, § 35A
Asslt w/Int Rape	Assault with Intent to Rape; Mass. Gen. Laws ch. 265, § 24
A&B	Assault and Battery; Mass. Gen. Laws ch. 265, § 13A
Open & Gross Lewdness	Mass. Gen. Laws ch. 272, § 16
Drugging for Sexual Intercourse	Mass. Gen. Laws ch. 272, § 3
Intimidating	Intimidation of a Witness; Mass. Gen. Laws ch. 268, § 13B

Disposition	
ss	suspended sentence
prob.	probation
inf. prob.	informal probation
CJ	defendant committed to sentence to be served at Mass. Corr. Inst. at Cedar Junction
Concord	defendant committed to sentence to be served at Mass. Corr. Inst. at Concord (the significance of being sentenced to Cedar Junction, the maximum security state prison, as opposed to other institutions has to do with parole eligibility dates and is a reflection of the seriousness of the offense committed by the defendant).
HC	House of Correction
ct	count
conc	sentence to be served concurrently
consec	sentence to be served consecutively
NG	not guilty
G	guilty
GP	guilty plea
N/P	indictment nolle prosequied
filed w/o ch. of plea	case filed without a change of plea